Supreme Court, U.S.
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In The OFFICE OF THE CLERK

Supreme Court of The United States

DANIEL DEFABIO and
PATRICIA DEFABIO,

Petitioners,

MICHAEL RUSINSKY,

Plaintiff,

vs.

EAST HAMPTON UNION FREE
SCHOOL DISTRICT, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION

DAVID R. GRONBACH
MOOTS PELEGRINI, P.C.
Attorneys for Petitioners
46 Main Street
New Milford, Connecticut 06776
(860) 355-4191

Appeal Press - (914) 761-3600 (212) 267-6602 (14920)

QUESTIONS PRESENTED FOR REVIEW

1) Whether the East Hampton Union Free School District violated plaintiff's freedom of speech when it prohibited plaintiff from refuting a false rumor about him that had been spread at the school?

2) Whether the East Hampton Union Free School District's restrictions on plaintiff's ability to refute the false rumor against him were overly broad, where the District prevented plaintiff's very presence in the school and suspended him for the remainder of the school year?

3) Whether the Second Circuit, in upholding the grant of summary judgment in defendant's favor, impermissibly extended the Supreme Court's holding in *Tinker* to prohibit a student's *attendance* in school because the student's "mere presence" was thought to provoke a substantial disruption?

LIST OF PARTIES

1) DANIEL DEFABIO, Plaintiff and Petitioner;

2) PATRICIA DEFABIO, Plaintiff and Petitioner;

3) MICHAEL RUSINSKY, Plaintiff;

4) EAST HAMPTON UNION FREE SCHOOL DISTRICT, Defendant and Respondent;

5) SCOTT FARINA, individually and in his official capacity as Principal of East Hampton High School, Defendant;

6) RAYMOND GUALTIERI, individually and in his official capacity as Superintendent of Schools of East Hampton Union Free School District, Defendant;

7) WENDY HALL, individually and in her official capacity as member of the Board of Education of the East Hampton Union Free School District, Defendant;

8) STEPHEN TALMAGE, individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

9) LAURA ANKER GROSSMAN, individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

10)SHARON BACON, individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

11)THERESA K. QUIGLEY, J.D., individually and in her official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

12)JOHN RYAN Sr., individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant;

13)MICHAEL TRACEY, individually and in his official capacity as a Member of the Board of Education of the East Hampton Union Free School District, Defendant.

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The opinion of the Second Circuit wherein the Court affirmed the lower court's dismissal of plaintiff's constitutional claims is reported at Defabio v. East Hampton Union Free School District et. al., 623 F.3d 71 (2d Cir. 2010) and is reprinted in the Appendix hereto, p.63a-82a.

JURISDICTION

This appeal stems from an action brought pursuant to 42 U.S.C. § 1983 (2009), against defendants, the East Hampton Union Free School District and other school officials, alleging violation of plaintiff Daniel Defabio's constitutional rights under the First and Fourteenth Amendments to the United States Constitution, including freedom of speech, freedom of association, due process and equal protection. *See*, U.S. Const. amend. I and XIV. The claims relate to events at the East Hampton High School on April 26, 2004, when the defendants reacted to a racially derogatory comment, falsely attributed to Daniel, by removing him from school in violation of his constitutionally protected rights.

The underlying complaint was initiated in the United States District Court for the Eastern District

of New York on April 25, 2006. On September 30, 2009, the Honorable Joseph F. Bianco issued a final decision granting defendants summary judgment motion on the §1983 and constitutional claims.

On October 13, 2010, the Second Circuit issued an opinion affirming the district court's grant of summary judgment in defendant's favor.

This Court has subject matter jurisdiction over the appeal pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, First Section

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions

On Monday, April 26, 2004, at 1:30 p.m., when Daniel DeFabio was a fifteen year old student at East Hampton High School, he was grabbed by an administrator from his seat in the cafeteria, led to a waiting area adjacent to the principal's office, asked his mother's phone number and then escorted out of the building by an East Hampton Police officer who brought him home, never to return. While Daniel was left to guess why he was being treated like a criminal, he assumed, correctly, it had something to do with a racially offensive comment being falsely attributed to him concerning the death of a Hispanic student who died over the weekend in a motorcycle accident.

Daniel first learned that the student killed was his acquaintance "Andres," when he arrived at school on the morning of April 26th. The school announcements included an invitation to a meeting in the auditorium for anyone who was distressed. On his way to his third period science class, Daniel was walking in the hallway when he overheard a male voice state "one down, 40,000 to go." He did not see who made the comment but he believed it was referring to Andres, the student who had died. When Daniel arrived at his science class, he whispered to D.A. what he had heard in the hallway. In response, D.A. pushed Daniel and said "how could you say something like that?" Daniel immediately responded "I didn't say that, I heard that in the hallway." D.A subsequently admitted and then recanted that he

may have been mistaken about what Daniel actually said.

While Daniel made his way to his seat, he observed D.A engaged in whispering something to student N.C., starting what would become a game of "telephone" fraught with consequences for Daniel. N.C. then gave Daniel a dirty look to which he responded "that didn't come from me." While Daniel was going to his next four classes, D.A. was busy telling his friends that Daniel had made the offensive comment.

Daniel was eating lunch when four or five Latino students approached his table. They yelled at him, mentioned a "racist comment" and someone threw something at him. Shortly thereafter, the school psychologist, Naglieri and a paraprofessional, Bill Herzog, came in and took Daniel out of the cafeteria.

At the cafeteria, Daniel was identified as the young man that made the comment. Daniel was brought to the nurse's office where Naglieri asked him what was going on. Naglieri told Daniel that he was accused of making a racial comment, which Daniel emphatically denied.

D.A. was asked by Naglieri if Daniel had made the statement and D.A initially told Naglieri that he was mistaken, that Daniel did not make the statement, but then later said that he did.

The school principal, Dr. Farina, called Daniel's mother, Patricia Defabio, and told her that Danny was accused of making a comment that upset the school and that he was sending Danny home

immediately with the assistant principal and the police. Dr. Farina told her that Danny was accused of saying "one down, 40,000 to go". Dr. Farina testified that he told Mrs. Defabio that "groups of students were under the impression that Daniel had made a derogatory remark against Hispanic students, or about Hispanic students, and that it had created an unsafe environment in the high school."

After arranging for Daniel's removal, Mr. Burns and Dr. Farina returned to the auditorium meeting with the students where the students questioned "why did he [Daniel] say these things, why did he evoke that."

Daniel and his family felt it was in Daniel's best interest to come back to the high school to finish his education, but he was not permitted back into school because of "fear of his safety." Because of the actions of the District to "protect" Daniel, he was falsely tagged a bigot.

School officials believed that Daniel's presence in the school would be inflammatory. The decision to discipline Daniel only occurred when he was unwilling to comply with the school directive to stay home and remain silent.

At all times after the incident, Dr. Farina did not want Daniel to return to school. He testified about his concern that "[t]o have groups of students start to discuss a situation where an ethnic statement was made in a large hallway would create tension between different groups of students."

Daniel's mother was told by Dr. Farina that Daniel could not return to school. On the evening of April 26, 2004, Principal Farina called Mrs. DeFabio. Mrs. DeFabio "wanted to know when we could come and address the rumor and when Danny could speak for himself and tell his side of the story." In response, Dr. Farina stated that it was not safe for Daniel to return to school and he wanted him to stay home until the situation calmed. Daniel wanted to communicate with the kids at school about the incident and on the evening of April 26th, he wrote a letter.

Early in the morning of April 27, 2006, the day after Daniel was removed from school, he faxed his letter to Dr. Farina. Daniel explained he wanted to communicate this message to the school community. It read as follows:

> To all the people who thought I have made a horrible comment, I hope you will listen to me now. Yesterday I heard a very unfortunate comment in the hall way. In disbelief I repeated it to a friend adding I can't believe someone could say something that terrible. Unfortunately, the person I told chose not to here the second part of my comment. He then repeated it to one person saying that I made this comment which I did not.
>
> When I moved here two years ago and came into the East Hampton school district I was considered different "the up island urban kid". The first people to befriend me were in similar positions; the

> kids coming from different countries because they too were considered different. Although over the past two years I have settled into my own interests and made many different friends I appreciate the first friendships I had in East Hampton high school.
>
> Please understand that I am upset about the loss of a classmate also. I [k]new Andres and I liked him. So I also share the sadness and grief of my classmates. I hope our thoughts and prayers can be with Andres's family and not on hate for a comment that was taken completely out of context.
>
> Again, let me say how sorry I am about the loss of Andres and the misunderstanding about a comment I would never say.
>
> Sincerely, Daniel DeFabio

Daniel asked if the letter could be distributed to the students. Dr. Farina called Mrs. DeFabio and told her "it was a very nice letter, but in order to keep the school calm he did not want to read it and that he thought that Danny just being absent from the school was better for the school and that could inflame the situation." Dr. Farina told Mrs. DeFabio that he would copy the letter and post it in the faculty lounge. He did not want copies of the letter to get into students' hands.

At an April 29th meeting, Patricia DeFabio and Daniel's stepfather, Michael Rusinsky, were informed that Daniel was being placed at home and

tutored for the remaining six weeks of school. The DeFabios' requests to have Daniel returned to school were rejected. A disciplinary suspension was never mentioned at the meeting. Daniel was being kept home "for his own safety".

In an effort to explain the police response to the high school, Dr. Farina told a journalist for the East Hampton Star "there was a comment said in a classroom, and it upset several of Andres's friends and students." Philip Pratt, an assistant principal, told the same journalist that the student who made the inappropriate comment was escorted from the building by a police officer "for his own safety." These comments confirmed to the student's that Daniel had actually made the racist comment.

District officials did not want Daniel to return to school to "tell his side of the story" and disseminate the content of his letter because they feared Daniel's presence in school would reignite racial tensions.

Given the impasse, Patricia DeFabio and Michael Rusinsky contacted an attorney who spoke to the Assistant Superintendent of schools on the morning of April 30, 2004. That afternoon, Patricia DeFabio and Michael Rusinsky received a hand delivered letter from Dr. Farina informing them that Daniel would be suspended for *five* days. On May 3, 2004, Patricia DeFabio received a second letter informing them that a Superintendent's hearing would be held on May 7, 2004, to determine whether Daniel would be suspended beyond the initial five days.

A Superintendent's hearing was held on May 7, 2004 and four witnesses testified. Daniel consistently maintained that he had overheard the comment in the hallway and merely repeated it quietly to D.A.. The Superintendent upheld Daniel's suspension for the remainder of the 2003-2004 school year and the plaintiff appealed.

Following the Superintendent's meeting, Principal Farina accompanied Daniel to a meeting with twelve student representatives of the Latin American community in the high school. Daniel tried to explain that he never made the offensive comment, but merely repeated it with the preface, "you would not believe the terrible thing that I just heard someone say in the hallway." Daniel also distributed his written statement to the students. Most of the students told Daniel they did not believe him because he failed to return to school. They found his absence and silence consistent with guilt, even though Farina informed them that he had kept Daniel out of school and denied his request to distribute the statement.

The Commissioner of Education upheld Daniel's appeal and issued a Decision dated August 7, 2006. The Commissioner determined that Daniel consistently maintained his version of the events, both at the hearing and to the principal. In contrast, D.A.'s "testimony and demeanor were not straightforward." Daniel also testified that when administrators questioned D.A., he heard him admit that he might have misheard or misunderstood Daniel. N.C. admitted that she never heard Daniel make the comment. Finally, Dr. Farina admitted that "his investigation did not include any

subsequent interviews with Daniel after the day of the incident and there were no written reports of any investigation to substantiate the charges." The Commissioner found it "notable" that the superintendent failed to discuss any facts or testimony of the witnesses and his decision did not demonstrate that he addressed or weighed their credibility or demeanor."

The Commissioner annulled Daniel's suspension and expunged it from his record, stating: "I am constrained to determine that the record does not contain sufficient and competent evidence that [Daniel] generated the offensive comment and thus engaged in the objectionable conduct as charged."

Because of the negative feeling toward Daniel in the school and the community, his family decided to move to California. Daniel and his family have suffered emotional and economic trauma as a result of this incident.

REASONS WHY CERTIORI SHOULD BE GRANTED

I.
Review Is Warranted Because The Second Circuit Opinion Impermissibly Expanded This Court's Holding In *Tinker*

The Second Circuit held that where the "mere presence" of a student in school would be disruptive, the school can prohibit the student's attendance, even where the student's conduct is nothing more than attending the school. The court's opinion

impermissible expands the holding of *Tinker* and its progeny beyond constitutional bounds.

The case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) has provided the standard framework for evaluating the constitutionality of most-viewpoint based censorship of student speech. However, the Second Circuit in this case used the *Tinker* analysis to uphold the School District's prohibition of plaintiff's right *to attend school*. Neither *Tinker* not any of its progeny support such a radical departure from established Supreme Court precedent.

The Second Circuit decision held that "it was objectively reasonable for [the Individual Defendants] to believe that they [were] acting within constitutional and statutory bounds [citation omitted] in prohibiting Daniel's return to East Hampton High School in light of repeated and serious threats to Daniel's physical safety." Defabio v. East Hampton Union Free School District, 623 F.3d 71, 77 (2d Cir. 2010). The court went on to state:

> There is no question that *Daniel's mere presence in the school, with or without his speech*, would likely result in violence or the threat of violence and would therefore "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."
> ...

Id. at 79. (Emphasis added).

Tinker and its progeny set forth the framework to circumscribe a student's First

Amendment right to *speech* in a school, not his *attendance* at the school. The Court of Appeal's extension of *Tinker* to the facts of this case impermissible deprived the plaintiff not only of his First Amendment rights to discuss the erroneous rumors that were spread against him, but also his right to a free and public education.

The decision of the school officials in prohibiting Daniel not only from speaking about the rumored comment, but speaking at all was clearly overbroad and violated Daniel's constitutional rights. *See,* Sypneiwski v. Warren Hills Regional Bd. Of Educ., 307 F.3d 243 *cert. denied* 538 U.S. 1033 (2003). A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad, that is, if it reaches too much expression that is protected by the Constitution. Id. The School's prohibition of not only Daniel's proposed speech, but also his mere presence at the school by suspending him for the remainder of the year, was clearly overbroad.

To put this case in perspective, the Second Circuit's decision, if rendered in 1957, would have opposed one of the seminal moments of the Civil Rights movement. In response to the Supreme Court's ruling in Brown v. Board of Education, 347 U.S. 483 (1954), nine African-American students entered the front lines of desegregation in public schools when they enrolled in the all white Little Rock Central High School in Little Rock, Arkansas. These students would become known as the "Little Rock Nine". In response to their enrollment, Arkansas Governor Orval Faubus called out the National Guard to prevent the students from

entering the school. The school was assailed by mobs of protestors threatening to lynch the students. President Eisenhower reacted by federalizing the entire Arkansas National Guard and sending the 101st Airborne Division of the United States Army to protect the Arkansas Nine and escort them to school. Even after the Nine were admitted to the high school, they were subjected to death threats as well as verbal and physical abuse. To say that their attendance at the school was "disruptive" is an understatement. Yet, if the Second Circuit's reasoning in this case was applied to the circumstances in 1957, under the flawed *Tinker* analysis the Little Rock Central High School would have been justified in denying the attendance of the "Little Rock Nine" based on the disruption their "mere presence in the school" would have created.

Modern scenarios that the Second Circuit's decision could support include a school's prohibition of an Iraqi/Afghani student on the basis that his presence at a school attended by students with parents serving in the military could lead to school disruptions, thereby justifying the student's prohibition from the school; a school could prohibit the attendance at school of an individual with physical deformities that disrupt other students; and as in this case, a school could prohibit an individual from attending based on an unsubstantiated rumor, the belief in which could disrupt the educational mission of the school.

Such reactions by the school legitimize the basest motivations that are often at the heart of false rumors, and the visceral reactions that teenage students are subject to. Rather than standing against

such reactions in this case, the School chose to placate the mob mentality of the student body and sweep Daniel out of sight, and out of mind.

Although there may have been a number of Latino students at Daniel's high school who would react strongly against him, the First Amendment required the school to accord him the protection that he was entitled to and the opportunity to explain the false rumors that were spread against him. As in the case of the Arkansas 9, even where a student's "mere presence" would create a disturbance at a school, the overriding concerns for the individual student's fundamental rights outweigh the potential disruption.

II.
Review Is Warranted Because The Second Circuit's Opinion Is Based on the Erroneous Premise That *Tinker's* Analysis Applied To The Non-Political "Speech" At Issue In This Case

The Second Circuit ignored the content of the speech at issue in this case, and instead focused on the claimed disruptive effect the speech would have on the school. The result was that Daniel's legitimate attempt to refute the false rumor against him was suppressed by the School, for fear of the disturbance his "mere presence" would create. Such an unjust result is evidence that the Second Circuit's application of *Tinker* to "all student speech" was erroneous. Where, as in the present case, the school's conduct actually helped foster the false rumor against the plaintiff, the school officials and the lower courts should have recognized plaintiff's First

Amendment right to refute the rumor spread against him.

"Tinker does not prescribe a uniform 'one size fits all' analysis. The Court must consider the context of the speech and the nature of the school's response." Lowery v. Euverard, 497 F 3d 584, 588 (6th Cir. 2007). Looking at the context alone and proclaiming that any and all speech is proscribed by the situation is not acceptable.

In Morse v. Frederick, 551 U.S. 393 (2007), C.J. Roberts delivered the opinion of the Court in which Justices Scalia, Kennedy, Thomas, and Alito joined. The case involved a student at a school-supervised event who unfurled a banner reading "BONG HiTS 4 JESUS". When the principal instructed the student to take down the banner, the student refused. The principal confiscated the banner and suspended the student. The Supreme Court opinion upheld the principal's conduct and created an exception to *Tinker* where the school may restrict student speech that "is reasonably viewed as promoting illegal drug use". *Id. at 403.* Thus, pursuant to Supreme Court precedent, school officials may not impose view-point based restrictions on student speech unless (1) the expression leads school officials to reasonably forecast a substantial disruption or material interference with school activities, Tinker, 393 U.S. at 514; (2) the students expression might reasonably be perceived by the public as bearing the imprimatur of the school, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988); or (3) the students expression can be reasonably viewed as promoting illegal drug use, Morse, 551 U.S. at 403. Schools may impose

viewpoint-neutral, content-based restrictions on student expression that is vulgar, lewd, obscene, or plainly offensive, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

Justice Breyer's concurring opinion in Morse recognized that additional clarity is needed on the application of the Supreme Court's tests in student speech cases:

> But unlike the Ninth Circuit, other courts have described the tests these cases suggest as complex and often difficult to apply. See, e.g. Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 326 (C.A.2 2006) (It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser,* or whether it applies only to political speech or to political viewpoint-based discrimination).

Id. at 430.

The present case provides as opportunity for the Court to clarify that *Tinker* does not apply to the non-political speech at issue in this case. The speech is set forth in a letter that Daniel drafted and submitted to the School, simply setting forth that he never made the racial comment attributed to him.

As Justice Stevens set forth in his dissenting opinion in Morse, with whom Justices Souter and Ginsberg joined, "In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor

expressly advocates conduct that is illegal and harmful to students." *Id.* at 435. The speech at issue in this case clearly does neither.

Contrary to *Tinker* and its progeny, Daniel did not seek to make any political statements in school; did not offer any lewd or sexually explicit remarks; and did not seek to promote any illegal drug use. He simply wanted to return to his high school and explain that he never made the racial remark that was attributed to him. *Tinker*, with its emphasis on the effect the speech would have on the operation of the school, is a poor and inadequate vehicle to address a student's desire to refute a rumor that was spread against him in the school, especially where school officials bore some responsibility for the rumor.

In Guiles ex rel. Guiles v. Marineau, 461 F.3d 320 (C.A.2 2006), the plaintiff student's rights under the First Amendment were violated when school officials put duct tape over a t-shirt depicting President George W. Bush in an unfavorable light using images of drugs and alcohol. Judge Cardamone delivered the opinion of the Court with Judge Pooler and Sotomayor joining. The opinion noted the lack of clarity in student-speech cases:

> We pause here to acknowledge some lack of clarity in the Supreme Court's student-speech cases. *Tinker* involved Political viewpoint-based discrimination and established a "material and substantial interference" test that permits schools to restrict student speech only where, as noted, "necessary to avoid material and

> substantial interference with schoolwork or discipline." 393 U.S. at 511, 89 S.Ct. 733. It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination.

Id. at 326 (emphasis added).

The court then discussed how *Fraser* emphasized the distinction between the political message of the armbands in *Tinker*, which upheld "the students' right to engage in a nondisruptive, passive expression of a *political viewpoint*" Fraser, 478 U.S. at 680, and the sexual content of the speech in *Fraser*, the penalties for which were "unrelated to any *political viewpoint* and thus did not implicate the rule of *Tinker*." *Id.* at 685. *See* Bd. Of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (plurality opinion) (stating that *Tinker* "held that students' rights to freedom of expression of their *political views* could not be abridged by reliance upon an 'undifferentiated fear or apprehension of disturbance' arising from such expression" (emphasis added)). Guiles, 461 F.3d at 326.

The Second Circuit then mistakenly proceeded "according to the understanding that *Tinker* applies to *all non-school sponsored student speech* that is not lewd or otherwise vulgar ..." *Id.* (emphasis added). The Second Circuit's application of *Tinker* to "all non-school sponsored speech" in Guiles was carried forward in the current Defabio case, and directly led

to the bizarre result prohibiting Daniel's innocuous speech dispelling the rumors that had been circulated against him. Clearly, the reasoning in *Tinker* and its progeny is not applicable in the world of personal speech to defend against false rumors. Yet, the application of *Tinker* in the present case supported the School's conduct in silencing a student who sought to defend himself against a false rumor that threatened his ability to even live in the community. Such a result is anathema to common sense and the First Amendment principles upon which *Tinker* was based.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted.

Dated: January 11, 2011

Respectfully submitted,

David R. Gronbach
MOOTS PELEGRINI, P.C
46 Main Street
New Milford, CT 06776
(860) 355-4191